No. 78-558

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN F. KRETCHMAR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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STATE OF NEBRASKA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

The petitioner, John Francis Kretchmar, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment rendered in this proceeding on July 5, 1978, by the Supreme Court of Nebraska.

OPINION BELOW

The Opinion of the Supreme Court of Nebraska, rendered on July 5, 1978, is reported at 201 Neb. 308 and is reprinted in the Appendix hereto.

JURISDICTION

Following a non-jury trial in the York County, Nebraska District Court, petitioner was found guilty of possession of more than one pound of marijuana, possession with intent to deliver and possession of a small quantity of cocaine. He was sentenced to two year's probation, with the last 90 days to be spent in custody in the York County Jail, in addition to paying a fine of $2,000.00 and directed also to attend an educational class regarding the use of controlled substances.

There was a direct appeal to the Supreme Court of Nebraska which affirmed the judgment of conviction on July 5, 1978 in a sharply divided 4 to 3 decision. On proper motion the Court stayed the mandate until on September 18, 1978, until adjudication by this Court by way of petition for writ of certiorari. The petition for certiorari is being filed within 90 days from the date of affirmance of the conviction.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether a Nebraska police officer may constitutionally stop and detain a passing motorist where the only basis for the stop of the automobile is the officer's "feeling" that the auto is "probably stolen"?

2. Does the Fourth Amendment to the Constitution apply to prevent the stopping of moving vehicles where the police officer stopping the car and making an arrest of the driver has no articulable reasons for stopping the moving vehicle except for some vague and undefined "feeling" that the vehicle should be checked out?

3. Does a Nebraska police officer have probable cause to stop a moving vehicle which breaks no traffic laws, but whose driver first "looks like" a Mexican, and when upon closer observation is observed not to be a Mexican?

4. Does the Fourth Amendment protect isolated stops of moving vehicles where there is no probable cause to believe any crime was committed, where there was no violation of any traffic laws, and where there are no articulable grounds for a "feeling" that the vehicle should be "checked out?"

5. May a Nebraska statute, Sec. 60-435, R.R.S. 1943, which gives permission to uniformed State Patrol Officers to require the driver of a vehicle to stop and show his driver's license and registration card and submit to an inspection of the vehicle, supersede the Fourth Amendment to the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Nebraska State Statutes, Sec. 60-435 (1943),

> "The superintendent and all members of the Nebraska State Patrol and all other peace officers mentioned in section 39-6192 shall have the power . . . (4) when in uniform, to require the driver thereof to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle . . ."

STATEMENT OF THE CASE

The Nebraska decision which cannot find in support even a single case from this Court is premised upon a simple set of facts which are uncontradicted, but which demonstrate total and complete abdication and disregard of the protection afforded citizens by the Fourth Amendment to the United States Constitution.

A. The Relevant Facts

The facts are not in dispute: Nebraska State Trooper John Adler testified that on September 15, 1976, he was traveling west bound at about 3:15 P.M. on Interstate Route 80 when he saw defendant's 1974 Chevrolet traveling west bound. (Tr. 89)[1]

He thought the driver was a Mexican male subject, and although the car was operated within the speed limit, Adler testified:

> "I felt at the time that the vehicle could possibly be stolen." (Tr. 89-90)

Other than his "feeling," there were no specific facts or circumstances to which the trooper testified which provoked his "feeling" that caused him to believe the car might "possibly be stolen." (Tr. 138)[2]

When the Trooper made a U-turn and headed east, he pulled up beside the vehicle and saw petitioner was not a Mexican. (Tr. 90; 138) He nonetheless stopped the car. Petitioner alighted from his car and produced his driver's license. (Tr. 94) Asked for the registration papers for the car, petitioner stated the car was a rented vehicle and the

[1] "Tr." is the transcript of evidence taken at the hearing and trial.

[2] The car was not stolen, it was properly rented from Avis Rental Service by the defendant. (Tr. 94).

rental papers were in the vehicle. (Tr. 94) Trooper Adler told him to get the papers from the car, which he did. (Tr. 95) He then handed the papers to the trooper.

The trooper observed that an object in the back seat, which appeared to be a tire, was covered with a green blanket, and, additionally, observed suitcases, clothing and a cooler in the back seat. (Tr. 95) At this time, the trooper said he detected an odor of marijuana. (Tr. 96) He then went to the front and ran an equipment check, and then went to the rear of the car for a further vehicle inspection. (Tr. 99)

Trooper Adler requested permission to search the trunk of the vehicle, but petitioner denied permission, stating that his constitutional rights were being violated and that the trooper could not look in the car. (Tr. 100) The trooper forcibly took the keys from the hand of defendant and put the keys in the trunk. Although defendant grabbed the trooper's hand to prevent him, the trunk was opened (Tr. 106); and the officer then observed many brick forms, which he believed were marijuana. (Tr. 115) Adler then removed a suitcase from defendant's automobile. Petitioner and the car were taken to the York County Sheriff's Office. (Tr. 117) At the office, and without a search warrant, the trooper forcibly opened the suitcase and from a pouch in which was found a blue metal container, a substance identified as cocaine was found. (Tr. 118; 119; 192) The police also removed a jacket taken from the front seat of the car and found a bottle in the jacket which contained a small quantity of cocaine. (Tr. 122)

B. The Ruling Below

The Court denied a Motion to Suppress Evidence and found petitioner guilty stating, amongst other things, that: "No evidence was offered by the defendant that he did not

know of the existence of the marijuana or the cocaine nor was any explanation offered as a reason for the quantity." (Tr. 248) And ". . . that the failure of the petitioner to otherwise explain his possession of this large quantity of marijuana which was processed and packaged in a form customarily used for distribution, supports a conclusion and finding beyond a reasonable doubt of possession with intent to distribute." (Tr. 249-250)

The Supreme Court of Nebraska affirmed the order denying the Motion to Suppress and by virtue of its decision, filed on July 5, 1978, has determineed that the Fourth Amendment is not applicable to protect moving vehicles from being stopped and searched.

Although the police officer did not use as a pretext the cover of the Nebraska statute authorizing the stopping of any vehicle to check out the driver's license and registration card, but merely grounded his belief that he could stop the car because of some vague, undefined and unwarranted "feeling" that the car might be stolen, the Nebraska majority stated they consider the stop of the vehicle to be within the ambit of the provisions of Sec. 60-435, R.R.S. 1943. (201 Neb. at 311).

Petitioner's claim that his Fourth Amendment rights were violated was overruled by the Nebraska Supreme Court.

REASONS FOR GRANTING THE WRIT

The Nebraska Supreme Court has created a novel constitutional problem, of such magnitude as to warrant plenary review by this Court.

1. **Nebraska has decided that the Fourth Amendment is not applicable to protect citizens from arrests while driving a vehicle, even absent any probable cause or suspicious circumstances that a crime is being, or was, committed.**

The State Trooper's pretext for stopping the moving vehicle traveling on Nebraska Interstate Highway I-80 was that the person driving the 1974 Chevrolet "appeared to be a Mexican male" (Tr. 49); and "I thought that if he was a Mexican male, if he was possibly an illegal alien from Mexico, that there was a good chance that he had a car that would not belong to him, but there was no way I could determine whether this vehicle was his without stopping him and checking him out, getting his driver's license and registration." (Tr. 50) But when Trooper Adler drove alongside the driver and saw he was not a Mexican (alien or otherwise) (Tr. 90; 138), he switched his claimed reason and then stated that although he saw the driver was not a Mexican, he "felt" that the car "might possibly be stolen." (Tr. 90; 138) He was not able to point to any specific or articulable facts from which his "feeling" was obtained. He testified: "The reason—there were no specific facts. I did not have a report saying that this vehicle was stolen. I did not know that this vehicle was

stolen.[3] I just felt that the driver of the vehicle did not fit the vehicle and I had an inkling, call it what you want, but I felt at the time the vehicle could possibly be stolen." (Tr. 49)

In discussing another vehicle stop, the Court of Appeals for the Eighth Circuit held:

> "There can be no question that the defendants were protected by the fourth amendment as they drove down the highway. We have held that a person is 'seized' for purposes of the fourth amendment when he is signaled to the side of the road by the police officer." *Carpenter* v. *Sigler*, 419 F.2d 169, 171 (8th Cir. 1969)

The Nebraska Court did not make any claim that the stop and search of the petitioner's car was constitutional under any previous decision of this Court involving the searching of an automobile. In that aspect, this case is not unlike *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) which held invalid the search of cars by a roving border patrol at or near the Mexican border. There was no pretext here that there was any roving patrol, that there was any fixed check-point; that there was any probable cause; or even that there was any reasonable suspicion, found sufficient for a street detention and weapons search. *Terry* v. *Ohio*, 392 U.S. 1.

Although the State Trooper grounded his reason for stopping the vehicle on his unarticulated "feeling" that the car "might possibly be stolen" (that same "feeling" might be used to stop any car, anywhere, at any time), the Nebraska Supreme Court, recognizing the obvious violation of the Fourth Amendment, attempts to justify the

[3] Indeed, the vehicle was not stolen. (Tr. 94).

stop of the car and the unwarranted search, upon the sweeping Nebraska statute which permits any patrol officer in uniform to stop a moving vehicle and to ask for driver's license and vehicle registration. Sec. 60-435, R.R.S. 1943; 201 Neb. at 311; App. 4. But the Nebraska statute must be held by this Court to be unconstitutional, as was a similar Delaware statute so held by the Delaware Supreme Court in holding random stops inherently arbitrary. *State* v. *Prouse*, (Del. 1978), 382 A.2d 1359. "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U.S. 160, 180 (Jackson, J. dissenting).

As the vigorous dissenting Justices in the Court below stated (201 Neb. 314) (App. 7):

> "The United States Supreme Court has held the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. See, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607, the Supreme Court held the stop of an automobile for even a brief period of time constitutes a 'seizure' within the meaning of the Fourth Amendment. The court went on to criticize random stops by the Border Patrol not based on a reasonable suspicion. While the Supreme Court has not ruled on the specific issue of whether random stops by state patrolmen to check documents are constitutionally valid, the principles enunciated in *Brignoni-Ponce* clearly suggest that they are not. The majority persists in ignoring the language of the Supreme Court and the weight of authority by relying on *State* v. *Holmberg*, 194 Neb. 337, 231 N.W.2d 672."

2. Even though the Nebraska Supreme Court is sharply divided on giving meaning to the Fourth Amendment to the Constitution, citizens driving through Nebraska are left without constitutional protection from privacy, arrest and search.

Two circuits have held explicitly that a police officer must have a reasonable suspicion that an illegal act has been committed before a motorist may be stopped and questioned: *United States* v. *Montgomery,* 561 F.2d 875 (D.C. Cir. 1977), and *United States* v. *Carrizoza-Gaxiola,* 523 F.2d 239 (9th Cir. 1975). These Courts have held directly opposite to the Nebraska Court.

In *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), this Court held impermissible stops for questioning by the Border Patrol which were not based on a reasonable suspicion. If this Court was unwilling to permit the use of such stops to the unlimited discretion of the Border Patrol when there is greater need for patroling the border than in the hinterland of Nebraska, then this Court should not countenance the existence of a Nebraska statute authorizing vehicular stops for any reason, any time, at any place merely to inquire if the driver has a driver's license. Such statute completely eviscerates the protection of the Fourth Amendment.[4]

The trooper's inarticulate hunch or "feeling" not based on any facts—articulate or otherwise— ". . . would invite intrusion upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result which this Court has refused to sanction." *Terry* v. *Ohio,* 392 U.S. at 22.

[4] "The [Nebraska] majority clearly says there are no Fourth Amendment rights to be free of arbitrary stops on a highway. I disagree." (Dissenting opinion, White, C. Thomas, J., App. 11) 201 Neb. at 314.

And, "if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." *Beck* v. *Ohio,* 379 U.S. 89, 97.

Further, in 1976 this Court stated, "the fact that the purpose of [traffic stop] laws is said to be administrative is of little relevance in weighing their intrusiveness on one's right to travel . . ." *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 560 n. 14.

There were considerably more suspicious circumstances in *Carrizoza-Gaxiola, supra,* than in the nebulous reasoning given by Trooper Adler for the stop of the car at the case at bar. Petitioner in *Carrizoza-Gaxiola* was stopped outside Nogales, Arizona because he appeared to be a Mexican, because the car he drove appeared to be brand new, and because the car had Mexican license plates. Arizona had a law similar to that of Nebraska permitting stopping of moving vehicles for license and registration check. The Ninth Circuit held this statute to be unconstitutional *as applied.* We respectfully stress that neither in *Carrizoza-Gaxiola,* or in this case was the vehicle stopped initially to be checked for compliance with licensing and registration requirements. The cars in both cases were stopped presumably to determine whether they were stolen vehicles. "Founded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity." *Carrizoza-Gaxiola, supra,* at 241; *United States* v. *Torres-Urena,* 513 F.2d 540, 542 (9th Cir. 1975); *United States* v. *Ward,* 488 F.2d 162, 169-170 (9th Cir. 1973 (en banc)).

Because petitioner's car was illegally stopped in the first instance, because the decision of the sharply divided Nebraska Supreme Court flies in the face of the Fourth Amendment protection and is in conflict with the decisions cited herein, both from this Court and that of several federal circuits set out, as well as that of the Delaware Supreme Court, this Court should enunciate the principles to guide Nebraska and other states in the specific problematical situation as here which will continue to surface until this Court speaks clearly on the subject.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be allowed.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF NEBRASKA
(201 Neb. 308)

No. 41730

State of Nebraska,

Appellee,

v.

John F. Kretchmar,

Appellant.

(Filed July 5, 1978)

Heard before White, C.J., Spencer, Boslaugh, McCown, Clinton, Brodkey and White, J.J.

Spencer, J. delivered the opinion. (Three Justices dissent)

Defendant appeals his conviction for possession of marijuana weighing more than 1 pound; possession of marijuana with intent to manufacture, distribute, deliver, or dispense; and possession of cocaine. He was sentenced to probation for a period of 2 years with the last 90 days to be spent in county jail, and fined $2,000. He assigns as error the overruling of his motion to suppress evidence seized from his vehicle, and the consideration of his failure to explain his possession in determining he possessed it with intent to deliver.

The facts are not in dispute. An officer of the Nebraska State Patrol, while traveling west on Interstate 80 in York County, observed defendant driving a late-model automobile in the eastbound lane. His initial reaction was that that the driver might be an illegal alien and that the car possibly had been stolen. He decided to check its registration. He turned his patrol car around on the median

and pursued the vehicle. When he pulled alongside the vehicle, still believing the car might be stolen, he turned on the red lights on the patrol car and pulled the defendant John F. Kretchmar, over to the side of the road.

After stopping at the side of the road, defendant walked back toward the patrol car. The officer met defendant between the two vehicles and asked to see his operator's license. Defendant appeared nervous and had difficulty locating the license in his billfold. He eventually produced the license and the officer then requested to see the vehicle registration. Defendant stated the car was rented and he had the rental papers in the vehicle.

The officer followed defendant to the car and stood by the open door on the driver's side while defendant retrieved the papers from the glove compartment. The officer detected the odor of marijuana. He looked inside the vehicle and observed what appeared to be a tire covered by a blanket behind the driver's seat on the floor, and on the rear seat there were suitcases, clothing, and a cooler.

After examining the rental papers the officer performed an equipment check on the vehicle. He then informed the defendant he smelled marijuana and desired to search the trunk. Defendant refused to consent to the search. The trooper took the keys from defendant's hand and proceeded to unlock the trunk. Defendant grabbed the trooper's hand in an attempt to prevent him from opening the trunk. The trunk was opened and the trooper observed it was filled with what he believed to be marijuana in brick form. Defendant who was placed under arrest, was transported to the York County sheriff's office.

Defendant's vehicle was also towed to the sheriff's office where the trooper removed a suitcase belonging to the defendant. Inside he found a leather or vinyl pouch with

a metal container enclosed. The contents of the container were later analyzed as cocaine. An inventory search of the vehicle also revealed cocaine in a pocket of a jacket lying on the front seat. Removed from the trunk were 238 kilos of marijuana weighing approximately 460 pounds.

The stop in this case resulted from an intuitive feeling on the part of the trooper that the driver of the vehicle did not fit the late model vehicle he was driving, and that a check should be made to ascertain whether or not the vehicle might possibly have been stolen. The officer testified he stopped the car for the express purpose "of checking him out, getting his driver's license and registration."

Section 60-435, R.R.S. 1943, permits an officer in uniform to require the driver of an automobile to stop and exhibit his driver's license and the registration card issued for the vehicle. The stop was within the ambit of that statute, which has been upheld in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672 (1975), and State v. Shepardson, 194 Neb. 673, 235 N. W. 2d 218 (1975).

In Holmberg we said: "A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present."

Subsequent to the stop, by the use of his senses the trooper became aware of the presence of marijuana. A trained officer should have no difficulty in smelling 460 pounds of marijuana. At that time, under our law, the officer had probable cause to search the automobile for marijuana without the necessity of relying on consent.

Defendant seeks to distinguish Holmberg and Shepardson on the theory that section 60-435, R.R.S. 1943, permits the stop of a moving vehicle only for the limited purpose

of enforcing the traffic laws. Section 60-435, R. R. S. 1943, reads, so far as material here: "The superintendent and all members of the Nebraska State Patrol and all other peace officers mentioned in section 39-6, 192 shall have the power (1) of peace officers for the purpose of enforcing any other law regulating the operation of vehicles or the use of the highways; * * *," We would consider the stop herein to be within the ambit of this provision.

The stopping of Kretchmar for the purpose of checking his driver's license and the certificate of registration for the car he was driving, if it may be construed to be a seizure, was not in any sense an unreasonable one. It did not violate any right given Kretchmar by the Fourth Amendment to the federal Constitution. Lipton v. United States (9th Cir., 1965), 348 F. 2d 591; State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672 (1975).

The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. The fact that the officer may have a suspicion the vehicle is stolen does not disqualify him from conducting an otherwise lawful section 60-435, R. R. S. 1943, check.

When the officer beecame aware that the car contained marijuana he had probable cause to arrest the defendant and to search the vehicle. Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). In that case, the occupants of the car were arrested and the car was driven to the police station where it was searched. The

United States Supreme Court said: "On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that even there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." The United States Supreme Court held, for constitutional purposes, it saw no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The instant case is readily distinguishable from State v. Colgrove, 198 Neb. 319, 253 N. W. 2d 20 (1977). There, this court held the car was stopped to serve warrants, not for the purpose of checking the operator's license and car registration. As soon as the car was stopped, the officers realized that the two individuals they were seeking were not in the vehicle. In the present case, the car was stopped for the specific purpose of checking the operator's license and the car registration.

This case is similar to State v. Shepardson, 194 Neb. 673, 235 N. W. 2d 218 (1975). There, the officer decided to make a spot check for proper vehicle and registration papers because the defendant did not seem to fit the vehicle and the thought occurred to him that the vehicle might be stolen. On the question at issue herein, this case is controlled by Shepardson.

This case was tried to the court without a jury. Preliminary to the imposition of sentence, the court summarized the evidence in a general way and at one point stated: "No evidence was offered by the defendant that he did not know of the existence of the marijuana or the cocaine nor was any explanation offered as a reason for the quantity." The court then proceeded to make certain findings of fact, the final one of which was: "Four, that the failure of the defendant to otherwise explain his possession of this large quantity of marijuana, which was processed and packaged in a form customarily used for distribution, supports a conclusion and finding beyond a reasonable doubt of the possession with intent to distribute."

Defendant argues that the aforementioned comments by the trial court constitute a violation of the fundamental principles that a defendant is entitled to a presumption of innocence and his failure to testify shall not create any presumption against him. The fallacy in defendant's assignment of error lies in the fact that he apparently misconceives the meaning of the trial court's remarks.

The court was not commenting as such on the failure of the defendant to testify. The court was simply commenting on the complete lack of any evidence of an exculpatory nature—whether through testimony of the defendant or otherwise—to mitigate against the natural and logical evidentiary presumption that the defendant was in possession of marijuana with intent to distribute. The comment was on the lack of evidence, not the lack of defendant presenting himself as a witness.

There is nothing in the remarks from the bench which justifies a conclusion that the trial judge considered the failure of the defendant to testify as in itself constituting or taking the place of evidence of guilt. It is obvious that

the undisputed and unrebutted evidence of guilt on the issue of intent was so overwhelming as to be totally inconsistent with any other finding.

There is no merit to defendant's assignments of errors. The judgment should be and hereby is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

The United States Supreme Court has held the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. See, Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564. In United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607, the Supreme Court held the stop of an automobile for even a brief period of time constitutes a "seizure" within the meaning of the Fourth Amendment. The court went on to criticize random stops by the Border Patrol not based on a reasonable suspicion. While the Supreme Court has not ruled on the specific issue of whether random stops by state patrolmen to check documents are constitutionally valid, the principles enunciated in Brignoni-Ponce clearly suggest that they are not. The majority persists in ignoring the language of the Supreme Court and the weight of authority by relying on State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672.

It is not necessary to again detail the authority contrary to the majority position except to mention cases decided since Holmberg whose language we feel is germane to the issue. Authority contrary to the majority's opinion existing prior to Holmberg was set out in the dissent of McCown, J., in State v. Holmberg, *supra*.

It is to be noted that even authority relied on by the majority in Holmberg is now doubtful. In Holmberg, the majority discussed two cases from the Eighth Circuit Court of Appeals to support its position, United States v. Turner (8th Cir., 1971), 442 F. 2d 1146, and Rodgers v. United States (8th Cir., 1966), 362 F. 2d 358. Language found in United States v. Harris (8th Cir., 1975), 528 F. 2d 1327, plainly makes adherence to a rule allowing random stops of automobiles in the Eighth Circuit questionable. After stating that detention of an automobile by police is a seizure for Fourth Amendment purposes, the court in Harris said: "It is well settled in justifying such an intrusion, a police officer '* * * *must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.*' " (Emphasis supplied.) Another case utilized by the majority in Holmberg, Lipton v. United States (9th Cir., 1965), 348 F. 2d 591, was limited by the holding in United States Carrizoza-Gaxiola (9th Cir., 1975), 523 F. 2d 239. Carrizoza-Gaxiola held that a warrantless stop which was part of an effort to detect stolen vehicles cannot be justified under the guise of a check for compliance with state licensing and registration requirements.

In two recent cases, courts considered the Holmberg rule and rejected it. See, United States v. Montgomery (D. C., 1977), 561 F. 2d 875; State v. Prouse, (Del., 1978) 382 A.2d 1359. In State v. Prouse, *supra*, the Delaware Supreme Court, in holding random stops inherently arbitrary, reasoned: "However, the factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process in that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any visibly

identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review."

Citing Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, the Eighth Circuit Court of Appeals in United States v. Harris, *supra*, held that a reasonable suspicion standard was to be applied in random automobile stops.

The majority here would equate intuition with reasonable suspicion. Intuition is not reasonable suspicion, but rather selective suspicion. Selective suspicion, without more, is merely a mask for personal prejudices. The following testimony of the officer illustrates the inherently arbitrary nature of random stops:

> "Q. Tell me what specific facts led you to believe that the motor vehicle was stolen?
>
> "A. The reason—there were no specific facts. I did not have a report saying that this vehicle was stolen. I did not know that this vehicle was stolen. I just felt that the driver of the vehicle did not fit the vehicle and I had an inkling, call it what you want, but I felt at the time that the vehicle could possibly be stolen.
>
> "Q. All right. Tell me what facts gave you the feeling that—.
>
> "A. Okay, I will do the best I can.
>
> "Q. Well, I hope so.
>
> "A. When I first observed the vehicle eastbound I saw that the driver at this time looked to be like a

Mexican male driving a new model Chevrolet and in my line of work people, or a car, if it is going to be stolen for various reasons a lot of times it is a newer model car, rather than an older model car, whether it be for profit, if you are going to steal a car, a lot of people will steal it so that they can make some money off it, or if they are going to steal a car they are going to take a car that is reliable, that gets them out of whatever they have been and will get them out of—to where they want to go, so the fact that it was a newer model car initially aroused my interest, along with the fact that Mr. Kretchmar at that time appeared to be a Mexican male. I thought that if he was a Mexican male, if he was possibly an illegal alien from Mexico, that there was a good chance that he had a car that would not belong to him, but there was no way I could tell whether this vehicle was his without stopping him and checking him out, getting his driver's license and registration. * * *

"Q. (By Mr. Bolan) Based on that information and based on what those observations were at that time you stopped the motor vehicle; is that correct?

"A. Yes."

The language of the Fourth Amendment is clear and unmistakable: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *." Fourth Amendment to the Constitution of the United States. Under the majority's holding, a motorist using the roads of this state is without a constitutional guarantee against unreasonable seizure. In reality, the selective enforcement of the law sanctioned here allows the guarantee to adhere to some and not to others. The "others" are

those of a specific ethnic type who may be driving a later model car, as here. What characteristics might be a catalyst to an officer's intuition are open to speculation. The majority clearly says there are no Fourth Amendment rights to be free of arbitrary stops on a highway. I disagree.

McCOWN, J., joins in this dissent.

CLINTON, J., dissenting.

In State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, we said: "We are not unmindful of the possibility of abuse of the statute as we interpret it. We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943." I joined in the majority opinion in that case upon the premise that we meant what we said in the above statement. Apparently all who joined in that opinion did not.

The record here discloses as is demonstrated in the dissent of White, C. Thomas, J., that the officer stopped the car of the defendant on a mere hunch and without any rational cause for suspicion. It was not a bona fide stop to accomplish the purposes authorized by section 60-435, R. R. S. 1943.

The reasons for my views were elaborated in the majority opinion in State v. Colgrove, 198 Neb. 319, at p. 324, 253 N. W. 2d 20 (1977), and I will not repeat them here.

WHITE, C. J., responding to dissents.

The majority opinion is criticized as ignoring the language of the United States Supreme Court in United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). It is stated that the principles enunciated in that decision clearly suggest the constitutional invalidity of random stops by state patrolmen to check documents. A careful examination of the language employed by the Supreme Court will reveal that no such inference can be drawn.

Brignoni-Ponce involved the activities of the United States Border Patrol, and the only issue presented for decision was whether "a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry." In holding such stops are prohibited by the Fourth Amendment, the court stated: "We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. *In the context of border area stops,* the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. * * *

"We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic. * * * a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to

a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis." (Emphasis supplied.)

In a footnote to the opinion the court stated: "Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. *Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.*" (Emphasis supplied.) This language has been previously quoted in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672 (1975).

In United States v. Martinez-Fuerte, 428 U. S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), the Supreme Court considered the propriety of Border Patrol operations using permanent checkpoints where all traffic is momentarily stopped and certain vehicles are selectively referred to a secondary inspection area for questioning of the occupants. The defendants argued "that the routine stopping of vehicles at a checkpoint is invalid because Brignoni-Ponce must be read as proscribing any stops in the absence of reasonable suspicion." The court disagreed, finding no constitutional infirmity in the procedure employed. It

stated: "The defendants note correctly that to accomodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. See Terry v. Ohio, 392 U. S., at 21, and n. 18. But the Fourth Amendment imposes no irreducible requirement of such suspicion. This is clear from Camara v. Municipal Court, 387 U. S. 523 (1967). * * * In Camara the Court required an 'area' warrant to support the reasonableness of inspecting private residences within a particular area for building code violations, but recognized that 'specific knowledge of the conditions of the particular dwelling' was not required to enter any given residence. 387 U. S., at 538. In so holding, the Court examined the government interests advanced to justify such routine intrusions 'upon the constitutionally protected interests of the private citizen,' id., at 534-535, and concluded that under the circumstances the government interests outweighed those of the private citizen.

"We think the same conclusion is appropriate here, where we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. See, e.g., McDonald v. United States, 335 U. S. 451 (1948). As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. United States v. Ortiz, 422 U. S., at 896 n. 2; see Cardwell v. Lewis, 417 U. S. 583, 590-591 (1974), (plurality opinion). And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement

technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints."

In footnote 14 therein the court stated: "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendants' position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that *this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use.*" (Emphasis supplied.)

From Martinez-Fuerte it is clear that the Fourth Amendment "imposes no irreducible requirement" of reasonable suspicion based upon specific and articulable facts before a motor vehicle may be stopped by officers in the performance of their duties. The test is one of balancing the interests at stake, a task which this court performed in State v. Holmberg, *supra*. The fact that an officer may entertain some suspicions concerning the driver of a vehicle should not invalidate an otherwise legal stop pursuant to section 60-435, R. R. S. 1943.

IN THE SUPREME COURT OF NEBRASKA

Sept. 18, 1978

Card to Counsel:

In the case of State v. Kretchmar, No. 41730, the following orders have been made:

Motion of appellant to stay issuance of mandate sustained; mandate stayed pending decision in the U.S. Supreme Court.

Very truly,

Larry D. Donelson

Clerk of the Supreme Court

In The

Supreme Court of the United States

October Term, 1978

No. 78-558

JOHN F. KRETCHMAR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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In The

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October Term, 1978

———o———

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JOHN F. KRETCHMAR,

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

———o———

OPINION BELOW

The decision and opinion of the Supreme Court of Nebraska, issued on July 5, 1978, is reported at 201 Neb. 308, and is reprinted in the appendix to the petition herein.

———o———

JURISDICTION

The jurisdictional requisites, as recited in the petition, are accepted by the respondent.

—o—

QUESTION PRESENTED

Neb. Rev. Stat. § 60-435 (4) (Reissue 1974) authorizes members of the Nebraska State Patrol to stop any moving motor vehicle and require the driver thereof to exhibit his operator's license and the registration card issued for the vehicle. A Nebraska State Patrol officer, acting pursuant to that statute, stopped a motor vehicle being operated on a public highway. It is the testimony of the officer that his decision to spot-check that particular vehicle and driver was triggered by an intuitive or instinctive personal hunch, but without any probable cause or reasonable suspicion, that the vehicle might be stolen.

The federal question and sole issue is whether such conduct is violative of the Fourth Amendment.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States and Neb. Rev. Stat. § 60-435 are correctly set forth in the petition.

—o—

STATEMENT OF THE CASE

The statement of the case contained in the petition is accepted, except for the intimation that the officer did not act pursuant to Neb. Rev. Stat. § 60-435. The officer's actions were done pursuant to the statute; although the circumstance which prompted the officer to exercise that authority was a purely subjective hunch that the vehicle might be stolen.

—o—

REASONS FOR DENYING THE WRIT OR DEFERRING ACTION THEREON

Subsequent to the filing of the petition herein, this Court granted certiorari in *State v. Prouse,* 382 A. 2d 1359 (Del. 1978); *cert. granted, Delaware v. Prouse,* No. 77-1571, Oct. 2, 1978. The pertinent facts and the question presented in both *Prouse* and the instant case are virtually identical. The State of Delaware does not appear to have a statute such as Neb. Rev. Stat. § 60-435, which expressly authorizes random stops of moving motor vehicles for the purpose of checking proper operator licensing and vehicle registration. However, in *Prouse* there appears to have been no question as to lack of state statutory authority for the random police stop there. Hence, this statutory distinction between the cases is insignificant for present purposes.

In *Prouse,* as here, the sole question is whether the random, non-systematic stopping of vehicles to check vehicle registration and operator's license, there being no

reasonable suspicion of any actual law violation, is constitutionally permissible. In *Prouse* the state court adopted the view that such random stopping of motor vehicles was inherently arbitrary and unconstitutional. In *Prouse,* of course, the state petitioned this Court for a writ of certiorari. Whereas, in the instant case the state court upheld the random stop procedure; and it is the convicted defendant Kretchmar who seeks the writ of certiorari here.

Under Rule 19 (a), the granting of certiorari, in *Prouse* indicates either that the federal question has not been heretofore determined by this Court or that the state court decided the question in a way probably not in accord with applicable decisions of this Court. We tend to think that the latter was the case.

Contrary to the meaning which the petitioner ascribes to *United States v. Brignoni-Ponce,* 422 U. S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574, we submit that decision quite unmistakably indicates the view of this Court to the effect that state and local enforcement agencies may lawfully conduct random limited stops, such as here, as a legitimate means of enforcing laws regarding drivers' licenses and vehicle registration, without doing violence to the Fourth Amendment. This is the correct interpretation of *Brignoni-Ponce,* as was enunciated by White, C. J., responding to dissents, in *State v. Kretchmar, supra.*

On the other hand, if it be the case that the grant of certiorari in *Prouse* indicates that the particular question raised there, and here, is not adequately answered by *Brignoni-Ponce,* then we would suggest that the Court

defer action on the petition here until a decision is reached in *Prouse;* such as was done in *Keney v. New York,* 388 U. S. 440, 18 L. Ed. 2d 1302, 87 S. Ct. 2091 (1967).

CONCLUSION

The reasons advanced in the petition here being not in accord with the decision of this Court in *Brignoni-Ponce,* the writ should be denied; or, in the alternative, action upon the petition should be deferred pending a decision of this Court in *Delaware v. Prouse,* No. 77-1571, *cert. granted,* Oct. 2, 1978.

Respectfully submitted,

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No. 78-558

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN F. KRETCHMAR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the
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OCTOBER TERM, 1978

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JOHN F. KRETCHMAR,

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VS.

STATE OF NEBRASKA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

As we read the 2½ page Respondent's Brief "In Opposition", it really requests the grant of certiorari to resolve the repeated and vexing legal issue raised.

However, the respondent has misstated important facts which need clarification.

In the Statement of the Case, we presented that the facts are not in dispute. The Nebraska State Trooper Adler testified that when he stopped the automobile driven

by the petitioner on the highway, the reason for stopping the car was to ascertain whether or not it was stolen, although he was not able to point to any specific or articulable facts from which his "feeling" was obtained. (Tr. 49; 90; 138)

And uniquely, his first stated reason for flagging down the car was because he thought the driver was a Mexican. (To the trooper, of course, this represents a prima facie showing of crime in Nebraska.) After he saw that the driver was not a Mexican (alien or otherwise) (Tr. 90; 138), he switched his claimed reason for stopping the car and stated that he "felt" that the car "might possibly be stolen." (Tr. 90; 138) Nowhere did the officer testify that his reason for stopping the car was to check the driver's license, and the respondent's Statement of the Case (Resp. Br. p. 3) is incorrect. It is clear from the evidence that the officer did not stop the car pursuant to Neb.Rev.Stat. Sec. 60-435. Both the majority opinion (Ptn. App. 4), and the minority opinion (App. 9-10) indicate the stop was made because the officer "felt" the car might be stolen, but was unable to testify to any articulable facts or reasons which gave rise to his "feeling."

The Grant of Certiorari in Delaware v. Prouse

On October 2, 1978, this court granted certiorari in *Delaware* v. *Prouse*, 77-1571. The issue in *Prouse* is identical to the case at bar; and accordingly, we respectfully submit that certiorari should be granted and that an order be entered allowing petitioner here to join in oral arguments.

Conclusion

For the reasons set out in the petition, for the seeming confession of error by the respondent, and because this court has granted certiorari on the identical issue in the *Prouse* case, *supra*, and to resolve a constitutional issue which recurs in a number of states, certiorari should be granted in this one.

Respectfully submitted,

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